online publishers association
www.online-publishers.org

April 20, 2004

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Secretary Clark:

The Online Publishers Association ("OPA") is pleased to submit these comments ("Comments") in response to the Federal Trade Commission's ("FTC" or "Commission") Advance Notice of Proposed Rulemaking ("ANPR"), published in the Federal Register, 16 C.F.R. pt. 316, on March 11, 2004, with respect to regulations to be enacted under the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM" or "the Act"). The Commission's ANPR raises important questions concerning the proper interpretation and application of this new federal legislation.

I. OPA Background And Summary Of Comments

OPA is an industry trade organization of online content publishers whose purpose is to represent its members on issues of importance with the press, government, public, and advertising community. OPA members are some of the most trusted and well-respected content brands on the Internet.[1] As a general matter, OPA members operate websites through which consumers can access editorial content and information via the Internet at no or minimal cost to users. Often, online publishers may require or encourage users to register on their websites. In connection with providing online editorial content and related services to registered subscribers, OPA members regularly send their subscribers electronic mail ("email") messages. These messages fall into two broad categories. In the first category are those email messages through which OPA members routinely communicate editorial content to users ("content messages"). In the second category are email messages that do not contain editorial content ("non-content messages"). OPA's comments separately address CAN-SPAM's potential impact on each of these categories of emails.

[1] Current members of OPA are: ABCnews.com, About.com, Bankrate.com, Belo Interactive, CBS MarketWatch, cbsnews.com, CNET Networks, CNN.com, CondeNet, Cox Enterprises, Edmunds.com, ESPN.com, Forbes.com, The Hearst Corporation, Jupitermedia, Internet Broadcasting Systems, iVillage, Knight Ridder Digital, Meredith Corporation, MSNBC.com, mtv.com, New York Times Digital, Reuters.com, Scripps Networks, Slate, Sporting News Online, Tribune Interactive, USATODAY.com, Wall Street Journal Online, Washingtonpost.Newsweek Interactive and weather.com.

Editorial content-based emails. As discussed more fully in Section II, the new CAN-SPAM legislation should not be interpreted to reach the first category of emails – content-based emails – at all. These messages simply are not "commercial" messages under the Act; instead, they are instances in which an online publisher communicates editorial content via email. Such content is protected by the First Amendment. This is the case regardless of whether the editorial content is accompanied by one or more advertisements, whether it contains a logo or other branding of the publisher website, or whether it contains the complete text of a news story or simply a hyperlink to the news story on the publisher website. In all such cases, emails through which OPA members deliver editorial content to consumers should be regarded as having as their "primary purpose" the delivery of constitutionally protected speech.[2]

Thus, in defining the term "primary purpose," it is OPA's view that where content-based emails are concerned, only the narrowest definition may apply or the Act may inadvertently regulate speech protected by the First Amendment. In other words, the FTC should construe "primary purpose" such that only emails containing no editorial content may be considered "commercial" email sent for the primary purpose of promoting products or services. It is never appropriate to assess the "primary purpose" of an email containing both editorial and advertising content in order to determine whether that particular email is "commercial" under the Act. In such a circumstance, undertaking such an analysis would be tantamount to regulating protected non-commercial speech and would therefore affect constitutional rights. The primary purpose of an email from an online publisher containing editorial content is to convey that speech. Neither the mode of delivery nor the inclusion of advertising can alter the fundamental nature of a communication and to the extent, therefore, that CAN-SPAM is read to reach content-based email messages, it would raise serious constitutional concerns, as outlined in Section II.

Non-content based emails. In addition to emails providing editorial content to users, OPA's members also send email messages that contain no editorial content, some of which may be considered "commercial electronic mail messages" ("commercial email") under the Act. As a service to its online users, OPA members provide consumers with the opportunity to sign up for various lists, including lists that offer users opportunities to receive promotions from advertising partners, either generally or according to topic (*e.g.*, travel, home furnishings, and theater tickets). Users with a particular interest in a topic or topics can consent to receive commercial emails related to their interests. This business practice has developed as an opportunity for online publishers to provide added value to subscribers with whom the publisher has a direct relationship. It also has become an important revenue source for online publishers, making it possible for them to continue to provide consumers with access to editorial content at no or minimal cost over the Internet. By helping online publishers to keep their websites available to the public as a free or minimal cost service, these legitimate

[2] As noted in footnote 6, to the extent spammers send unsolicited commercial emails with unrelated editorial content as a subterfuge for compliance with CAN-SPAM, OPA encourages the FTC and the state Attorneys General to enforce CAN-SPAM's fraud provisions vigorously.

emails support a valuable public service. Unduly curtailing publishers' ability to continue to support such widespread access to content would undermine the Act's purpose of enhancing the Internet's role in the flow of welcome information.

Although OPA members are not necessarily unique with respect to their commercial email practices, they do stand in a different position vis-à-vis both consumers and advertisers than perhaps many businesses conducted in whole or in part online. Indeed, OPA members' email practices readily distinguish them from the "spammers" with whom Congress is concerned. Significantly, OPA members only send emails to consumers with whom they have an established relationship and who have consented to receive the email communications OPA's members send to them. Simply put, OPA's members have policies of not sending unsolicited commercial emails. Additionally, OPA members' commercial emails provide an unsubscribe mechanism allowing recipients to be removed from the list for future mailings. Finally, OPA's members also adhere to best practices that include clearly identifying the publisher as the sender of the email within the actual communication to the consumer, whether in the "from" line, by way of a clear logo, or in the actual text of the email message. Thus, the commercial email communications that OPA members send do not implicate the primary concerns underlying the CAN-SPAM Act.

OPA's Support for CAN-SPAM Goals. OPA supports Congress's goal of protecting consumers from unsolicited commercial or "spam" email and is pleased to have this opportunity to provide these Comments in response to the FTC's ANPR. The Act's findings begin with the recognition that "[e]lectronic mail has become an extremely important and popular means of communication, relied on by millions of Americans on a daily basis for personal and commercial purposes," the "low cost and global reach" of which "offer unique opportunities for the development and growth of frictionless commerce."[3] OPA agrees the Internet provides an invaluable medium for the facilitation of communication and the conduct of commerce. As an organization, OPA is committed to leading the online publishing industry in promoting the use of the Internet as both an effective advertising medium and as a sustainable media business for publishers, thereby ensuring the continued viability of the Internet as a delivery mechanism of both quality content and commercial opportunities to consumers.

The legislative history for CAN-SPAM does not express a concern with legitimate commercial email, which is welcomed by, and useful to, consumers. Without proper interpretation and implementation, the CAN-SPAM Act could, however, impose undue burdens on senders of legitimate email that may decrease the efficiency of such communications without eradicating the "spam" emails with which Congress was concerned. Section III therefore addresses the manner in which OPA proposes the FTC interpret and implement the Act's reach with respect to commercial emails.

In particular, OPA's comments focus on three issues, proposing that the FTC exercise its Rulemaking authority to clarify and make explicit that: 1) in light of the fundamental distinction between editorial content and advertising, editorial content-based

[3] CAN-SPAM, § 2(a)(1).

emails are not commercial email messages covered by CAN-SPAM; 2) with respect to emails such as those that OPA members send to their users pursuant to consent that may be considered commercial emails, the one and only "sender" is the OPA member originating the email; and 3) forward-to-a-friend emails are not commercial email. OPA also notes the FTC should not reduce the CAN-SPAM 10-business day standard for compliance with unsubscribe requests.

II. The CAN-SPAM Act Does Not Reach And Should Not Be Construed To Impact Constitutionally Protected Speech

OPA members routinely send email messages containing editorial content to their users. The statute's definition of "commercial electronic mail messages" should not be read to include messages of this nature. Instead, the FTC should adopt rules making explicit that the "primary purpose" of an email message containing any editorial content is to convey constitutionally protected content and is not the commercial promotion of a product or service – regardless of whether the editorial content is provided in full text or via a hyperlink to a story, and regardless of whether it is accompanied by advertising for one or more products or services. Such content-based email messages simply are not the type of communications that CAN-SPAM seeks to regulate, nor are they part of the problem the Act seeks to remedy. By the plain language of the Act, Congress never intended the Act's requirements for "commercial email" to apply to email with editorial content. The FTC's rulemaking with respect to the "primary purpose" test should ensure that the definition of "commercial electronic mail messages" under the Act could not be interpreted to impose liability on OPA's members for the distribution of such content-based emails. Not only would such overregulation go beyond the legitimate and worthwhile aims of the statute, it would also entail abridging the protections of the First Amendment and result in the unintended consequence of limiting the dissemination of editorial content to consumers.

The content of the newsletters, newspapers, magazines, journals and other publications published by OPA's members is entitled to the full protection of the First Amendment. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (the fact that "books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."). *See also Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967) (same). Similarly, it is clear that any emails OPA members send containing the kind of editorial content that is available on their websites are similarly fully protected by the First Amendment. Indeed, even those emails that contain editorial content and some form of advertisement are entitled to the protections of the First Amendment, because commercial speech contained in the email does not strip the email of its constitutional shield.[4] Accordingly,

[4] *See Pacific Gas. Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 9 (1986) (newsletter from utility that was distributed to ratepayer in monthly billing envelope was not commercial speech but was, instead, "the kind of discussion of matters of public interest that the First Amendment both fully protects and implicitly encourages") (citations omitted); *Bernardo v. Planned Parenthood Federation of America*, 115 Cal. App. 4th Supp. 322, 346 (2004) (presence of advertisements for specific Planned Parenthood clinics on Planned Parenthood website did not convert website into commercial speech); *accord*, *Ad World Inc. v. Township of*

many of the emails that are sent by OPA's members contain constitutionally protected speech that cannot be regulated absent a state interest of the highest order. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("[t]ruth may not be the subject of either civil or criminal sanctions where discussions of public affairs are concerned.").

If, for example, a breaking news email announcing the signing of All-Star shortstop Miguel Tejada is sent to a Baltimore Orioles fan who has signed up to receive sports updates from an online publication and that breaking news email contains editorial content and a link to the publication's website and an advertisement for a sporting goods store that sells t-shirts with Miguel Tejada's name, it is possible that, if the FTC adopts a broad definition of "primary purpose," that email could be misinterpreted as a commercial electronic email message by some law enforcement agency or civil court. Without express FTC guidance making clear such editorial content-based email does not constitute commercial email for purposes of the Act, OPA members and other content providers may be forced to censor protected speech through abiding by CAN-SPAM's regulations even with respect to content-based emails. This may limit or unnecessarily restrict the flow of constitutionally protected communication.[5]

OPA wants to emphasize that it is not proposing that emails containing editorial content be examined to determine whether or not particular content-based emails fall within the Act's definition of commercial emails. On the contrary, OPA is proposing that as a rule email messages containing any editorial content, even if accompanied by advertisements, should be considered to have a primary purpose that is non-commercial under the Act. The FTC in its Rulemaking should adopt a narrow primary purpose standard which makes explicit that if the content of the regulated speech (here, emails) has editorial content or is speech involving a matter of public interest, that speech is not "commercial email" and is therefore not subject to regulation under CAN-SPAM. Such an interpretation would be a straightforward reading of the statute and congressional

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Doylestown, 672 F.2d 1136, 1139 (3d Cir. 1982) (community newspaper was non-commercial speech despite only a few pages of "non-advertising.").

[5] As such, OPA believes that, unless the FTC adopts the narrowest possible definition of "primary purpose," CAN-SPAM may be subject to legal challenge as both substantially overbroad and impermissibly vague. A statute is substantially overbroad, and, thus invalid, if it would " 'penalize a substantial amount of speech that is constitutionally protected' . . . even if some applications would be 'constitutionally unobjectionable.' " *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 867 (E.D. Pa. 1996), *aff'd,* 521 U.S. 844 (1997), (finding federal Communications Decency Act unconstitutional) (*quoting Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992)). If "primary purpose" is interpreted in an overbroad manner such that CAN-SPAM regulates constitutionally protected emails, the entire Act may be struck down. Thus, OPA urges the FTC to make clear that the definition of commercial email messages does not include the types of emails discussed above. Without such clarification, CAN-SPAM may be impermissibly vague. A vague law is one that "fails to convey to persons of ordinary intelligence reasonable notice of what conduct is prohibited and creates a danger of arbitrary and discriminatory enforcement." *Shea v. Reno*, 930 F. Supp. 916, 935 (S.D.N.Y. 1996), *citing Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). CAN-SPAM may not sufficiently put the public on notice as to what the "primary purpose" test entails and what content is being regulated. This vagueness concern heightens the potential chilling effect CAN-SPAM could have on OPA's members – and the corresponding First Amendment harm.

intent, would help assuage OPA concerns, and would harmonize CAN-SPAM with existing First Amendment doctrine.[6]

III. The Online Publisher Is the Proper Sender of Certain Commercial Emails

CAN-SPAM was enacted to address and rein in illegitimate uses of unsolicited emails, and, broadly speaking, is therefore a proper attempt to regulate commercial speech.[7] As drafted, however, the new legislation leaves the FTC to appropriately tailor the scope of the regulations. The FTC needs to ensure its regulations do not impermissibly reach senders of legitimate commercial email and impose onerous burdens that in effect will re-define and undermine legitimate and consensual online commercial relationships. As application of CAN-SPAM's requirements to OPA members' commercial email relationships demonstrates, CAN-SPAM could be construed too broadly and may produce consequences that are not only beyond its aim, but also in some cases are at odds with its fundamental purpose.

At the heart of the CAN-SPAM legislation is Congress's clearly stated concern that the growing number of *unsolicited* and/or *fraudulent* emails being sent to consumers is imposing costs on consumers and businesses alike and threatening the efficiency and effectiveness of Internet communication generally. The Act's very title — Controlling the Assault of *Non-Solicited* Pornography and Marketing Act — aptly evidences this fundamental focus. (emphasis added) Specifically, Congress's findings emphasize concerns that most "unsolicited commercial email[s]" are "fraudulent or deceptive in one or more respects,"[8] the receipt of which "may result in costs to recipients who cannot refuse to accept such mail,"[9] "creat[ing] a risk that wanted electronic mail messages, both commercial and noncommercial, will be lost, overlooked, or discarded amidst the larger volume of unwanted messages."[10]

OPA shares these same concerns, as it is in the business of sending subscribers emails they agree to receive. CAN-SPAM must not be interpreted to impose new requirements on senders of legitimate and solicited commercial email in a manner that is not only unwieldy and burdensome, but may thwart some of the very goals the Act seeks to accomplish by rendering legitimate email communication more costly and less efficient. Specifically, by expressly stating that a single email may have more than one

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[6] To the extent that unscrupulous "spammers" seek to utilize this interpretation for editorial content in an illegitimate manner in order to continue to send consumers unsolicited mail without complying with CAN-SPAM, the FTC is empowered to prosecute fraud and deception, and OPA is not suggesting the FTC limit its prosecutorial discretion to address such nefarious conduct when and if it arises.

[7] It is well-established that the Constitution affords less protection to commercial speech than it does to fully constitutionally protected speech. *See Bolger v. Young Drug Products*, 463 U.S. 60, 64 (1976). The First Amendment, however, does afford some protection for commercial speech. *Id*. Indeed, truthful, lawful commercial speech may only be regulated where there is a substantial governmental interest in the regulation, the regulation advances that governmental interest, and the regulation is not more extensive than necessary to serve the governmental interest. *Central Hudson Gas & Electric Corp.*, 447 U.S. 557, 563 (1980).

[8] *Id.*, § 2(a)(2).

[9] *Id.*, § 2(a)(3).

[10] *Id.*, § 2(a)(4).

"initiator" and by leaving open the possibility that a single email communication might have multiple "senders" for purposes of the Act, CAN-SPAM could require OPA members to significantly alter the manner in which they send emails that users consented to receive. OPA does not believe this was Congress's intent. The Congressional Determination of Public Policy in Section 2(b) of the Act succinctly sets forth a clear and narrow policy end underlying the legislation, namely, that: "senders of commercial electronic mail should not mislead recipients as to the source or content of such mail; and recipients of commercial electronic mail have a right to decline to receive additional commercial electronic email from the same source." A straightforward and reasonable reading of this and other provisions of the Act strongly suggests that even OPA's non-editorial content emails to subscribers were not intended by Congress to be regulated by the Act.[11]

OPA therefore proposes the Commission formulate rules that clearly and appropriately tailor the application of the "sender" requirements to harmonize the reach of the legislation with its underlying purpose. Specifically, OPA proposes the Commission exercise its authority under Section 13 of CAN-SPAM to issue regulations to clarify the definition of "sender." (ANPR E:2) As presently defined in Section 3(16) of CAN-SPAM, the term "sender" creates great ambiguity both in terms of who is considered the sender of an email message under the Act and the manner in which consumers can unsubscribe from receiving future emails from that sender. CAN-SPAM defines the sender as the company who (i) initiates the email (including those who merely procure or induce someone to send the email) *and* (ii) whose commercial product is being promoted. [12] This definition was meant to require companies sending unsolicited emails and fraudulent offers to consumers to not only clearly identify themselves, but also provide consumers with the ability to easily unsubscribe from receiving future emails from that company. Accordingly, Section 5(A)(5)(a) of the Act makes it illegal to initiate a commercial email without including the proper unsubscribe option for the "sender" of the email.

In practice, however, the Act could have the effect of imposing new requirements on companies who send legitimate and welcome commercial emails of the type described above that OPA members regularly send to their subscribers as part of a subscriber list for certain goods or services. By placing the burden to offer an unsubscribe option on the "sender" of a commercial email, CAN-SPAM could inadvertently undermine the very purpose of the Act. For example, under CAN-SPAM, if an online publisher sends a user an email relating to an offer of discount tickets for an upcoming play at a local theatre, pursuant to an affirmative request from its user that it send ticket offers for the user's metropolitan area, the online publisher may not be considered the sender of that email, because the online publisher is not promoting its own product or service. Instead, the

[11] It is possible, for instance, that by excluding "transactional or relationship messages" from the definition of commercial emails, *id.*, § 3(2)(B), Congress did not intend to reach such emails. Though in these Comments OPA focuses on a possible narrowing of the term "sender" to tailor the statute's reach to its purpose, it is also possible the FTC could explicitly interpret the definition of "transactional or relationship messages" as authorized by the Act to take such messages outside the scope of the Act entirely.

[12] "[T]he term 'sender' [. . .] means a person who initiates such a message and whose product, service, or Internet website is advertised or promoted by the message." *Id.* §3(16)(A) (emphasis added).

theatre offering the discounted tickets could be considered the sender of that email. In practice, this has a number of ill-advised and perhaps unintended effects.

Not only would such an interpretation defy consumer expectations, it would create confusion for users and online businesses alike. As explained above, OPA topical emails are not unsolicited, nor are they fraudulent. OPA members provide a service to their users, offering a range of products and special opportunities via an online publisher with whom they have a relationship.[13] An overbroad application of CAN-SPAM would eviscerate valuable and symbiotic relationships that online publishers have fostered with their subscribers over the past several years, whereby users recognize the online publisher's topical emails, and value the email as a separate offering from the publisher's website content. Because under the analysis above, the "sender" is now the owner or owners of the commercial product or products that are being advertised in that message, the role of the publisher vis à vis its topical lists has been reduced to a ministerial one, fraught with complications and privacy concerns.

Under this reading, CAN-SPAM means that each time the online publisher seeks to send its subscriber an email containing an offer for another company's product or service, it must compare that company's unsubscribe list with its own list before doing so in order to make certain consumers who have unsubscribed from the advertiser do not receive the message – even though the consumers have asked the publisher to send it. That is so even though the email was sent as a service that the recipient user consented to receive from the publisher, who, for the purposes of the email communication, is the known consumer brand. The problem becomes even more complex and potentially burdensome when the email provides multiple offers from different advertisers. When providing opportunities from a variety of brands (such as airlines or hotels) to interested consumers, each time the publisher considers sending a different company's offer, the publisher must compare each of the advertisers' lists with its own to make sure that any consumer who unsubscribed from any advertiser does not receive the email with multiple offers, and furthermore make certain consumers are provided with an opportunity to unsubscribe from each advertiser.

This requirement produces not only manageability and efficiency concerns; it also creates additional privacy concerns. In order to actually screen its unsubscribe list against one or more advertiser's unsubscribe lists, an online publisher and those advertisers would have to share personally identifiable information for those very consumers who have requested to be taken off the list in question and possibly in violation of web site privacy policies that say such information will not be shared. Furthermore, the online publisher would have to offer the user a way to opt out and send that information to the advertiser. Even a local theatre with no previous email list is now forced to retain personally identifiable information — email addresses — so they do not send them email in the future. Finally, although in this example the consumer has received the email communication by virtue of its affirmative consent given to the

[13] OPA has not prepared comments with respect to the "transactional or relationship" exception contained in the Act, but obviously believes that a considerable number of its emails to users fall in this category, including, among others, emails related to service offerings and updates, legal notices and disclaimers.

publisher (once screened against the advertiser(s) unsubscribe list), the Act does not require the recipient of the email offer be given an opportunity to unsubscribe from further similar emails from the publisher (because it is not the publisher's product or service being advertised), as would have been the customary best practice prior to CAN-SPAM. [14]

CAN-SPAM thus creates a conundrum whereby permission-based lists risk being penalized simply for providing a service consumers want – offers they have designated as of interest to them – from a sender (*i.e.*, the publisher) whom they know and trust. Furthermore, the law does not require consumers be given the option to unsubscribe from the proprietary list itself, and recipients may be unable to do so other than by unsubscribing entirely from each brand that is offered in each of the list's email offerings. For OPA members, the legislation fundamentally alters their relationships with their subscribers, despite the fact their commercial emails do not have any of the hallmarks of the "spam" emails the Act seeks to rein in.

OPA proposes the FTC make explicit in its regulations that, at least with respect to permission-based lists (particularly those lists that are controlled by a consumer-facing website such as an online publisher), there should be only one "sender" for purposes of this Act, and that should be the publisher.[15] The notification requirements of Section 5(A)5(a) should apply to these publisher list managers to make CAN-SPAM consistent with best practices and consumer expectations. By so doing, the FTC could regulate unsolicited commercial email consistent with Congress' purpose, and reduce the unnecessary burdens the Act places on businesses that are not engaging in the practices at which the Act is aimed.

OPA proposes the FTC could do so by implementing regulations that would deem a business the one and only "sender" of a commercial email for purposes of the Act, regardless of the offers or advertisements contained therein, when the following conditions are met:

> (i) there is an existing relationship between the consumer and the business sending the email;
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> (ii) the email communication is being sent pursuant to the consent of the recipient; and
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> (iii) the business sending the email is identified clearly and accurately in the actual communication (whether in the "from line," by virtue of a logo, or in the actual text of the message)

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[14] This customary best practice accords more closely with the policy goal articulated in Section 2(b) of the Act, that a recipient has the right to decline further emails from the same *source.*

[15] OPA is proposing that the online publisher be deemed the "sender" of such an email for purposes of CAN-SPAM regulations only. OPA believes such an interpretation will provide the most sensible and convenient mechanism for managing email lists, while providing an effective unsubscribe option to email recipients. OPA does not believe its members would necessarily assume liability for the content, products, or services offered by third parties.

The first prong of this test would distinguish emails sent from a known source with which a consumer has an existing relationship from those sent "cold" from a source with whom the recipient has no relationship. The second prong would further limit the emails that a business with a pre-existing relationship with a consumer could send to that consumer to only those emails that the consumer has consented to receive. This second limitation would, for instance, preclude an online publisher from sending a topical commercial email to a consumer who subscribes to its technology newsletter, but who did not consent to receive that topical commercial email. The final prong would eliminate any concern that the consumer would not be able to identify the source of the email. By rendering a business that meets these criteria the "sender" of the email for purposes of the Act, the FTC can ensure recipients of commercial emails of this nature are able to unsubscribe from the actual list to which they initially subscribed, without creating undue burdens on the consumer or the publisher. When emails are sent to such a list, the company whose product happens to be promoted in that email message should not be considered the sender of the email for these reasons.

To this end, OPA would propose this definition be used to eliminate the undesirable possibility that an email list to which a consumer has affirmatively subscribed would be deemed to have as its sender both the publisher and the advertiser(s). OPA would propose this should be the standard whether there are one or multiple advertisers' products promoted in an email that meets the above criteria. OPA has given careful consideration to the implications that having multiple senders for an email would have for its business in particular, and urges the FTC to seriously consider implementing regulations that do not allow for that possibility.

IV. Forward-to-a-Friend Emails Are Not Regulated By CAN-SPAM

Emails that are forwarded from one friend to another or emails sent from one friend to another via a website software function (collectively known as "forward-to-a-friend" emails) should not be subject to the Act's requirements with respect to commercial email messages, even if they contain promotions for commercial products or services. Indeed, OPA suggests that forward-to-a-friend emails should properly be regarded as "routine conveyances," which the Act explicitly excludes from the definition of "initiate." It follows that there is no "sender" of such an email for purposes of the Act, and consequently no person or entity to whom the Act's requirements can be applied. In such an instance, the initiator (*i.e.*, the friend) is not promoting his or her commercial product and is, therefore, not the "sender" under CAN-SPAM. Nor is the advertiser whose product is promoted in the forwarded email the "sender," when, as in the case of a forward-to-a-friend, the advertiser did not initiate the email message to the friend.

This straightforward reading is entirely in keeping with the statute's aims and is, moreover, the only practical way in which to deal with this category of email messages. The "reasonable consumer" test is consistent with the analysis that forward-to-a-friend is not regulated by CAN-SPAM. In such cases, the consumer receives information that their friend believed was of interest to them. The email references the friend, and may

provide personalized content added by the forwarding friend. The recipient consumer does not think that the online company initiated the email, and therefore, even if a company's product is promoted, under the reasonable consumer test, the company did not initiate the email. If the company did not initiate the email, it cannot meet the first element of the sender definition, and therefore it is not the sender.[16]

Many commercial websites provide forward-to-a-friend services by enabling consumers to send a selected news article to a list of friends, to promote an upcoming event of mutual interest, or to promote a specific product or service via its software. Applying best practices, the forwarding email always identifies the email or name of the original friend, often with a notation such as "your friend thought this would be of interest to you," and the option of a personalized notation added by the forwarding friend. As a rule, prior to CAN-SPAM, the company or commercial website that assisted the original friend in sending the email did not retain the email address or name of the recipient friend. The forwarding of the message was primarily for convenience, or notification, and not for retention in website databases.

To the extent friends forward editorial content, as many online publishers allow as a service to its subscribers, that should be considered constitutionally protected speech and thus not commercial email under CAN-SPAM in any event. This is particularly true given that several of the major online publishers are subscription-based (regardless of costs), and some recipients might not be subscribers to a certain publisher's site. Putting aside the constitutional arguments against classifying "forward-to-a-friend" emails containing editorial content as commercial emails, as a practical matter, if the FTC determines that transmitting content in this manner equates to the promotion of a commercial product or service, many businesses might likely terminate the entire service. The same would likely be true if the Act's requirements were applied to forward-to-a-friend emails that contained only commercial content. In either case, the Act would penalize consumers who want to inform others of specific online content. Such a reading of the Act would dampen the flow of public information over the Internet, which is not in keeping with the Act's purpose. Second, it would be inconsistent for the FTC to determine that when a friend sends a story to a friend by transmitting a link via the browser (for example, using the "Send a Link" command from an Internet Explorer browser), it is not subject to the requirements for commercial email under the statute, but when the friend emails the story via a similar service provided within a website (perhaps with some personalization from the original friend), it is.

Furthermore, to the extent the email promotes a commercial product or service, the owner of that commercial product or service does not know to whom the friend will send the forward until the friend decides to forward it. If forward-to-a-friend emails are commercial emails covered by CAN-SPAM, a technical reading of the Act could be misread to require the email addresses of all of the recipient friends to be first compared to the online business's unsubscribe list to confirm that the recipient had not yet unsubscribed from receiving its emails. This is technologically very challenging, and certainly difficult, if not impossible, to occur simultaneously with the initiation by the

[16] CAN-SPAM § 3(16)(A).

original friend. Given that the original friend was the one who initially thought the recipient friend wanted the email, the online company previously may not have had the recipient's email address, and might never have sent email to that person again, but now must maintain the email address in its database to confirm his or her unsubscribe status. To require, as CAN-SPAM does, strict liability for initiating emails generated by one friend to another throughout the world places too onerous a burden on online businesses, and does not serve the intent or meaning of CAN-SPAM. The cost related to maintaining and comparing the list of "friends" with those who unsubscribed from receiving an email specifically from the company also would be prohibitive (particularly when formerly the website did not retain the email address in any form) and, therefore, most websites would terminate the service.

For the foregoing reasons, forward-to-a-friend emails should not be considered commercial email under CAN-SPAM. The FTC should make that distinction explicit as part of its Rulemaking authority granted in Section 13 of CAN-SPAM.

V. The Period Of Time In Which To Comply With The Unsubscribe Request Should Be No Less Than 10 Business Days

Finally, in response to ANPR C:1, OPA believes 10 business days is the minimal acceptable period of time in which to process unsubscribe requests. To have a requirement less than that period would be commercially burdensome and potentially unattainable.

Thank you for the opportunity to submit these Comments on the ANPR.

Sincerely,

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